United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7616

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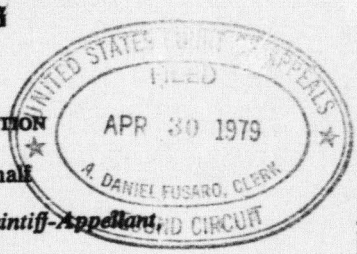
For the Second Circuit



In Re FRANKLIN NATIONAL BANK SECURITIES LITIGATION

ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated,

Plaintiff-Appellant,

and

LOUIS PERGAMENT,

Intervenor-Plaintiff-Appellant,

against

ERNST & ERNST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R. SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD EMRICH, and ROBERT C. PANEPINTO,

Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF OF APPELLANTS IN SUPPORT OF PETITION FOR REHEARING OR IN THE ALTERNATIVE FOR REHEARING EN BANC

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No. 76-7616

REPLY BRIEF OF APPELLANTS IN SUPPORT OF PETITION FOR REHEARING OR IN THE ALTERNATIVE FOR REHEARING EN BANC

Preliminary Statement

In their brief in opposition to the Petition for Rehearing, defendants-appellees ("defendants") agree with plaintiffs-appellants ("plaintiffs") that neither Rule 23 of the Federal Rules of Civil Procedure nor the federal

constitution requires class representatives to subpoena nominees which have not responded to letters requesting the identities of beneficial owners of the relevant securities. Plaintiffs believe that such a position is sound both as an interpretation of this Court's opinion and in light of prior judicial precedent construing Rule 23 and due process requirements for notice in such situations. Plaintiffs respectfully request that the Court clarify its opinion so as to eliminate any question in this regard.

Defendants do not strongly contest plaintiffs' conclusion that under the reasoning of Oppenheimer Fund, Inc. v. Sanders, ___ U.S.___, 98 S.Ct. 2380 (1978) ("Sanders"), subpoenas may not be served to obtain information needed for effecting notice to the class. Nor do they disagree with plaintiffs' position that class representatives should not be required to pay nominees' charges for identification of beneficial owners when such charges are shown to be excessive. Plaintiffs submit that where the amounts sought by individual nominees appear to be excessive and the nominees refuse to appear before the District Court voluntarily, class representatives should not be required to pay the amounts requested. Rather, the District Court should have discretion to hold that in such a situation plaintiffs' obligations are satisfied by mailing the class notice to such nominees

together with a request that the nominees retransmit the notice to their beneficial purchasers.

ARGUMENT

POINT I

PLAINTIFFS REQUEST THE COURT TO CLARIFY ITS OPINION WITH A SPECIFIC RULING THAT CLASS REPRESENTATIVES ARE NOT REQUIRED TO SERVE SUBPOENAS ON NOMINEES WHICH FAIL TO RESPOND TO LETTER REQUESTS

A review of the Court's opinion on this appeal strongly supports the joint conclusion of the parties that the subpoena procedure suggested was "at most an optional method of reducing plaintiff's cost, not a requirement of due process...." Defendants' Brief, p.6. The Court's discussion of subpoenas was specifically focussed on the District Court's discretion to shift identification costs to brokers under Rule 45. In re Franklin National Bank Securities Litigation, 574 F.2d 662, 669, 675-76 (2d Cir. 1978). The Court did not discuss issuance of subpoenas to non-broker nominees, which nominees the Court assumed would furnish the information requested without charge, but only the issuance of subpoenas to brokers. Id. at 674-76. Moreover, the Court did not state that plaintiffs were required to issue subpoenas, but only that "As to these [the brokerage houses]

the subpoena duces tecum procedure...is available." Id. at 675 (emphasis added)

Such an interpretation of the Court's opinion is also appropriate in light of several additional considerations. First, an enormous and unreasonable effort would be required of class representatives if all non-responding nominees had to be subpoenaed.* Second, the proposed interpretation is extremely desirable in light of the further clogging of already overburdened courts** which would occur if class representatives had to institute hundreds of such subpoena proceedings in securities class actions. Furthermore, the identities of the beneficial owners are not discoverable through the use of subpoenas in any event under the Supreme Court's analysis in Sanders. See discussion in Appellants'

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* See Petition for Rehearing, pp.6-9.

** See, e.g., Hon. Lewis F. Powell, Jr., "Reforms - Long Overdue," 33 Record of the Association of the Bar of the City of New York 458 (1978); Hon. Irving R. Kaufman, "Judicial Reform in the Next Century," 32 Record of the Association of the Bar of the City of New York 9 (1977).

Petition for Rehearing, pp.9-11.*

For the above reasons, plaintiffs believe that the Court's opinion does not require the issuance of subpoenas. However, it is appropriate to apprise the Court of the experience of plaintiffs' counsel that in a number of securities class actions defendants have recently taken the position that this Court's opinion does require the service of subpoenas on all nominees who do not voluntarily respond to letter requests. Consequently, plaintiffs respectfully request that the Court clarify its opinion with

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* Defendants do not argue that plaintiffs' belief that Sanders prevents the issuance of subpoenas herein is wrong. Rather, they suggest that it is "open to question" whether Sanders prevents discovery from non-parties as opposed to parties or whether Sanders prevents discovery for the purpose of challenging the costs for which a non-party seeks reimbursement. See Defendants' Brief, p.10 n.4. Neither suggestion is convincing. The mere fact that discovery from a third party is at issue would not produce a different result from Sanders, since the Sanders decision was based on an analysis of the type of information which may be obtained pursuant to the discovery rules and not on the relationship to the litigation of the person from whom discovery is sought. Furthermore, any effort to obtain information from a nominee concerning the reasonableness of the amount charged would be aimed at making it economically feasible to send notice to class members. Consequently, such efforts would be made to enable plaintiffs to send the notice and not for "true discovery purposes" as defined in Sanders. See 98 S.Ct. at 2391, n. 20.

an express ruling that neither Rule 23 nor the federal constitution requires the service of subpoenas on non-responding nominees.

POINT II

THE DISTRICT COURT SHOULD HAVE DISCRETION TO RELIEVE CLASS REPRESENTATIVES OF THE RESPONSIBILITY OF OBTAINING THE IDENTITIES OF BENEFICIAL OWNERS FROM NOMINEES WHICH ARE NOT SUBJECT TO SUBPOENA AND WHICH SEEK EXCESSIVE REIMBURSEMENT

As shown in the Petition for Rehearing, great variation exists among brokers in the amount of reimbursement requested and in the formulae utilized for computing identification charges. (SA 7-8, 34-85) Additional requests for reimbursment of identification costs may also be received after the notice of pendency of class action is mailed, especially if brokers come to believe that costs cannot be shifted to them through subpoena proceedings because of the Sanders decision. Furthermore, information obtained by counsel for plaintiffs has revealed that far more extensive requests for reimbursement are now being made in other securities class actions than have been made in this

action.*

Plaintiffs submit that Rule 23 does not require a class representative to pay a nominee an excessive charge as a means of obtaining the identities of that nominee's beneficial owners. On the understanding that plaintiffs would have no ability to bring the nominee involved before the District Court through the issuance of a subpoena, plaintiffs suggest the following.

In the event that plaintiffs believe that a particular nominee is requesting excessive reimbursement, plaintiffs will bring their grounds for such a belief to the District Court's attention. At the same time, plaintiffs

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* In March 1979, letters were mailed to nominees requesting the identities of beneficial owners in connection with the proposed settlement of Desimone v. Bowers, 76 Civ. 3506 (S.D.N.Y.) (LFM) (the "Syntex" litigation), a securities class action in which lead counsel are also counsel for plaintiff-appellant Robert Gold herein. The class period in the Syntex litigation is October 13, 1975 through August 6, 1976, a period roughly equivalent to the class period in the present action. To date, counsel for the class representatives in Syntex have received more than three times as many requests for reimbursement as were received in this action, and requests are still arriving. While the amounts requested are often similar to those requested in this action, certain requests have been strikingly high. For example, the firm of Katz & Scher has requested $4000 for making a search. Chase Manhattan Bank - a company which was a nominee in the present action and which did not request any reimbursement herein (see SA 29, 30) - is apparently requesting a minimum of $600 in Syntex.

will notify the nominee involved that plaintiffs are taking such a step and invite the nominee to subject itself to the jurisdiction of the District Court for the purpose of a judicial determination as to whether or not the amount charged is reasonable. If the nominee does not appear and the District Court determines that the charge is excessive, the District Court should have discretion to relieve the class representative of the responsibility of obtaining the identities of the beneficial owners from the nominee involved. In such an instance, plaintiffs' responsibilities under Rule 23 should be fully satisfied by mailing the class notice to the nominee involved with a request that the nominee retransmit the notice to the beneficial owners. Plaintiffs submit that any requirement that plaintiffs pay an amount determined to be unreasonable by the District Court would conflict with the provision in Rule 23(c)(2) that no more than a "reasonable effort" must be undertaken in identifying class members.

CONCLUSION

For the reasons given above and in the Petition for

Rehearing, the Court should reconsider its decision on this appeal and clarify its decision as requested above and in the Petition for Rehearing.

Dated: New York, New York
April 30, 1979

Respectfully submitted,

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STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

PATRICIA K. COLE, being duly sworn, deposes and says that she is in the employ of Milberg Weiss Bershad & Specthrie, attorneys for the within Plaintiff herein, and is over the age of 21 years. That on the 30 day of April, 1979, she served 2 copies of the within REPLY BRIEF OF APPELLANTS IN SUPPORT OF PETITION FOR REHEARING upon the attorneys for the respective parties named below, by depositing a true copy of the same to each of them, securely enclosed in postpaid wrappers in a post office box regularly maintained by the United States Government at One Pennsylvania Plaza, New York, New York, directed to each of them at their respective addresses set forth below, those being the addresses within the State designated by them for that purpose on the preceding papers in this action, or the places where they then kept their respective offices between which places there then was and now is a regular communication by mail:

SEE ATTACHED LIST

Patricia K. Cole
Patricia K. Cole

Sworn to before me this

30th day of APRIL, 1979.

Mitchell K. Aaron
Notary Public

MITCHELL K. AARON
Notary Public State of New York
No. 4683364
Qualified in Nassau County
Term Expires March 30, 19[illegible]

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